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NEW YORK STATE
ASSOCIATION OF COUNTIES

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Committee on Native American Affairs and Gaming

Before the House of Representatives
Committee on Resources

Oversight Hearing Regarding

The Status of Settling Recognized Tribes' Land Claims in the State of New York

- On Behalf of New York State Counties Impacted by Tribal Land Claims -

July 14, 2005

Chairman Pombo and Members of the Committee,

The Board of Directors and constituent counties of New York State Association of Counties (NYSAC) are grateful that you have allowed me to speak for them regarding the status of settling recognized tribes' land claims in New York State. NYSAC's purpose is to provide legislative advocacy on behalf of New York's 62 counties at state and federal levels. NYSAC's Standing Committee on Native American Affairs and Gaming was formed in response to the several Indian land claims in New York and the issues related to Native American tribes that arose in New York during the pendancy of those claims. I have been active in helping the NYSAC Committee, communities across the state and the County of Madison, my employer, understand and respond to the complex and contentious issues related to Indian land claims in New York for the past six years.

If you have questions about the status of the various court cases involved, I'll ask your permission to refer the questions to S. John Campanie, Madison County Attorney who is with me here at these hearings.

I want to leave you with two important messages today. First, that the history of Indian affairs in New York is much different than the rest of the country. Second, NYSAC suggests seven principles be added to the ongoing land claim settlement negotiations, with the most important being that the affected counties be given a meaningful role in these negotiations.

Today, Indian land claims involve every part of the state: from Long Island to the Canadian border; from Lake Ontario to the Pennsylvania border; from the Hudson Valley to the Finger lakes and the Niagara frontier and right in the center of the state where I live.

Thirty-one of the State's 62 Counties are potentially impacted by land claims with many being named as defendants of convenience in the claims. In those cases, where the United States sits on the sidelines as an observer and where the State asserts its 11th Amendment sovereign immunity defense, counties and other local governments bear the brunt of defending land claims, answering the concerns of their citizens and trying to respond to a genuine assault on the free enjoyment and governance of our communities. Still other counties have found themselves in the curious position of having to endure claims for ejectment of their citizens and loss of local control on lands within their borders without being parties to the suits and without having a meaningful seat at the table in attempting to negotiate out-of-court settlements.

Our NYSAC committee is a strong coalition of those counties directly impacted by the claims, those who fear that additional claims may be filed in the future and other counties like Sullivan County, located 50 miles north of New York City in the Catskill Mountain region, that have indicated a willingness to accept tribal casinos, under conditions that will guarantee promised benefits, mitigate impacts and contribute to settling claims

around New York State.[1] Our group has adopted the understanding that in our separate attempts to find solutions to the issues related to land claims, we would agree with each other when we could and support each other when we didn't. We hope that in your deliberations and in any negotiated settlement proposal that comes forward you will accept that differences in communities and situation may foster unique solutions to common problems. In that vein, I have communicated with affected counties in New York to advise them that they should communicate directly with this Committee in writing, any thoughts they wish to offer for your consideration.

The 8-to-1 decision by the US Supreme Court in the *Sherrill* case[2] and the Second Circuit Court of Appeals' decision in the *Cayuga* land claim[3] provide new and clear guidance on allowable remedies in and resolution of New York's Indian land claims. Clearly the possibility of New York tribal groups reasserting jurisdiction over vast areas of upstate New York has been greatly diminished and the rich tradition of over two centuries of home rule and local government in the Empire State has been affirmed.

In the decision of the Supreme Court, Justice Ginsburg's guidance was unmistakable.

> *"…standards of federal Indian law and federal equity practice preclude the Tribe from unilaterally reviving its ancient sovereignty, in whole or in part."*

Also

> *"The long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN (Oneida Indian Nation) from gaining the disruptive remedy it now seeks."*

In *Cayuga*, reversing a $247 million judgment against New York State, the Second Circuit panel found "…*no reason why the equitable principles identified by the Supreme Court in Sherrill should not apply*…" to bar the Cayuga land claims. Based on the application of laches and equitable principles, the Court found that the claim "…*was subject to dismissal ab initio*", or from the beginning.

Finally, after years of litigation, millions of residents of upstate New York have been sustained in their belief that our courts won't turn back the clock and perpetrate new wrongs on innocent communities. We think that the law has finally caught up with common sense. I speak today to present the proposition that the equitable principles voiced by the Courts dictate that any proposal to go beyond the decisions in these two cases and to establish Indian country, in any form, within the long-established, stable

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[1] For preliminary assessment of impacts see April 2004 Study prepared for the Sullivan County Legislature "Planning for the Future: Analyzing the Potential Economic Impacts of Class III Casino Hotels on Sullivan County, NY" Spectrum Gaming Group, LLC; See also Resolution 39-05 of the Sullivan County Legislature

[2] City of Sherrill v. Oneida Indian Nation of New York, 125 S. Ct 1478 (2005) decided Mar. 29, 2005. Hereafter "*Sherrill*"

[3] Second Circuit Court of Appeals – Cayuga Indian Nation of New York v. George Pataki, 2005 U.S. App LEXIS 12764, decided June 28, 2005. Hereafter "*Cayuga*"

communities of upstate New York, can only be accomplished with the full acquiescence and participation of the communities and local governments involved.

Please understand that the communities impacted by land claims are vibrant communities of numerous, well developed rural home sites and operating farms in the heart of the Country's third ranking dairy and third ranking wine grape producing state[4]. Land claim areas include several cities, many villages, and innumerable unincorporated hamlets. There are retail businesses; manufacturers of every sort; colleges, public and private schools; hospitals; resort areas; and functioning public infrastructure of roads, utilities, sewer, water and special improvement districts; canals (including the Erie Canal), and highways (including Interstate 90, also known as the New York State Thruway). A lot has happened since the first state treaties were made in 1788. There is a "there" in upstate New York

In *Sherrill*, Justice Scalia validated the sense of the citizens and local governments of New York when he observed that what the Oneida Nation and other plaintiff tribes were doing was "*asking the court to sanction a very odd checkerboard system of jurisdiction in the middle of New York State*" and that "*It's just a terrible situation as far as governance is concerned… It would create a chaotic situation if we say that you have jurisdiction in the middle of New York State over any pieces of land that you can buy*."

It is hard to understand where these land claims should lead without a basic understanding of what has gone before. In the late 18th and early 19th century when the thirteen original states were strong and the federal government was struggling, New York and other states exercised what they thought was their pre-constitutional sovereign right to administer Indian affairs and extinguish Indian title.[5] Federal and state records are full of references acknowledging New York's responsible administration of Indian affairs in providing for it indigenous people from the early days of the republic, which, by some accounts, was more equitable than federal actions elsewhere.

From the time of the Revolution until the middle of the 19th century, New York acquired large tracts of Six Nation's homelands across the State and much of it was awarded to Revolutionary war veterans as state and federal bounties for service. Some of the large state-tribal land transactions predate the American Revolution and the adoption of the United States Constitution. We believe that tribal claims against these pre-Constitutional transactions, such as that recently filed by the Onondaga Nation for over 4 million acres, have been barred by the Second Circuit's dismissal of a similar Oneida claim in 1988.[6]

Most New York Indian land claims, based on alleged violations of the Indian Trade and Intercourse Act first adopted in 1790 and significantly modified during the ensuing 44 years, rely on a new, novel interpretation of the meaning of the act first espoused by the

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[4] Empire State Development Report "US Dairy Industry in the US and Northern NY", February 2005; U.S. Department of Commerce Report, "U.S. Wine Industry –2002" WWTG Meeting, November 2003.

[5] See City of Sherrill v. Oneida Indian Nation of New York, Brief for the Petitioner, US Supreme Court No.03-855

[6] Oneida Indian Nation of New York et al v. State of New York et al 860 F. 2d 1145; (2d Cir.1988).

Oneida plaintiffs in 1970. In most cases it is asserted that New York did not have the authority to take title to Indian lands without the approval of the United States, an assertion that the federal government never acted on until 1992 when the United States intervened in the Cayuga land claim. The United States intervened in the Oneida claim in 1998, the same year that plaintiffs in that case sought the ejectment of 20,000 innocent land owners.

Adding to the sense of chaos of our current situation is the fact that most of the counties involved did not exist when the events that provide the backdrop for these land claims occurred. Unlike tribal lands in the west, the federal government has exercised no superintendence over the land or the tribes in New York nor has the United States ever had an ownership interest in the lands involved.

Despite federal acquiescence and disinterest in New York's tribal matters, New York has always been seen to have an "Indian problem" that years of federal policies of removal, segregation, assimilation, allotment, reorganization, and self-determination have never addressed. Federal programs seem to have only worsened the pain of our native people and contributed to the rift between our Indian and non-Indian communities.

New York's problem is so unique that Indian Law legal scholar Felix Cohen devoted a whole chapter to the New York Indians in his seminal 1941 work "*Handbook of Federal Indian Law*." Interestingly Cohen's summary on the various New York tribes lists six groups that are federally recognized tribes today (Seneca, Tonawanda Band, St. Regis Mohawk, Tuscarora, Onondaga, Cayuga), two tribes that are not federally recognized (Shinnecock and Poospatuck) and makes no mention of the existence of the Oneida Indian Nation of New York except to note that "as a tribe these Indians are known no more in that State." Consistent with decades of federal policy statements, Cohen denies the existence of a Cayuga reservation and omits any reference to an Oneida reservation. [7] The disappearance of tribal lands and the jurisdictional situation in New York is further documented by the submissions of the defendants in all of the New York land claims and is starkly evident in the submission of the defendant counties and State of New York in the several pending land claims and in the *Annual Reports of the Commissioner of Indian Affairs* of the late 19th and early 20th centuries presented for consideration by the City of Sherrill and the *amici* in *Sherrill.*

In 1948, further affirmation of New York State's preeminent role in relations with its tribes was documented in U.S. Senate hearings that formally sanctioned State criminal and civil jurisdiction over the New York-created reservations in the state that the federal government had long before acknowledged to be under state control. Indeed, the title to some Indian lands in New York is held in trust by the State while the federal government holds no New York tribal lands in trust. [8]

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[7] Handbook of Federal Indian Law, Chapter 22, US Government Printing Office Washington 1942 Page 417 Footnote 6; and page 424

[8] 11 Stat. 735 Treaty with the Seneca, Tonawanda Band, 1857 Article 3.

Another factor in the historic backdrop of New York Indian land claims is the factionalization and division of the tribes that began around the time of the American Revolution. Today we see several bands of Seneca people in western New York and Oklahoma, Stockbridge-Munsee people in Wisconsin, Oneida people in New York, Wisconsin and Canada, three distinct Mohawk governments, and Cayuga people in New York and Oklahoma. These rifts seem not to have been overcome by the passage of time or the common desire to resolve and move beyond ancient land claims and, indeed, have made resolution of all claims more difficult.

The legal necessity of having all tribal claimants as parties to the land claim lawsuits brought the various groups together to file the suits. These disparate tribal groups have different needs and greatly differing perceptions of equitable settlements. In the Oneida claim, for example, the plaintiff tribes appear to oppose each other as much as they do the defendant counties. With the self-serving name calling and labeling as "out-of-state tribes" by the factions and tribal remnants that still live in New York, the prospect of an all-party agreement for the Oneida, Stockbridge-Munsee and Cayuga claims recedes further into an uncertain future. The Cayuga claim is complicated by the fact that there is strong competition between the two groups of tribal plaintiffs, one of whom is from Oklahoma, the other from New York, and now the Cayuga Nation of New York is experiencing an internal struggle for power. At what point do we admit that these ancient grievances should be put behind us?

Within New York, the Oneida Indian land claim provides the "worst case scenario" of why the Counties across the state are justifiably concerned with land claims, Indian affairs and gaming. The aggressive and now voided assertions of sovereignty of the Oneida Indian Nation of New York have caused counties around the state to take notice of the impacts that development and actions by similarly aggressive tribes might have on their communities.

Funded by proceeds from a casino operating off trust land, on land now declared to be under local, not tribal jurisdiction, and without a valid state-tribal compact, the Oneida Nation of New York began buying land in open market transactions. The New York Oneidas have acquired in excess of 17,000 acres in Madison and Oneida counties across 15 towns, villages and cities [9]and have unilaterally declared those parcels to be tax-exempt and free from local or state regulations and taxation. Imagine, arguably the largest development to have ever occurred in the area being completed without involvement by the local government who would otherwise have had planning, zoning, fire, safety and environmental review and oversight responsibilities.[10] The 1000 member Oneida Nation enjoyed over $70 million in annual profits from their casino in 2001 when

[9] See Attached Map by Madison County Planning Department of "Current Oneida Indian Nation Landholdings" dated July, 2005.

[10] Turning Stone Casino and Resort located in the Town of Verona, NY is operated by the Oneida Indian Nation of New York. See Rome Daily Sentinel Jun 9, 2005 article "High-rolling resort cost tribe $300M+" and Syracuse Post Standard April 28, 2005 article "Town: Turning Stone Worth $378M"

it employed 3,300 people. [11] Today the Nation employs a reported 4,200 central New York citizens.

In addition to the New York Oneidas' monopoly on gaming in Central New York, they have established a near monopoly on gas station and convenience store operations in the land claim area. The big draw for the Oneida stores is lower prices on fuel and tobacco products because the tribe refuses to collect and remit sales and excise taxes on sales of these products to non-members of the tribe. Tribal leaders have chosen to ignore the US Supreme Court decision in the *Milhelm Attea* taxation case [12] by not collecting and remitting sales and excise taxes legally due to the State and local governments. In 1995, 32 non-tribal convenience stores collected and remitted these taxes and only one non-taxing tribal store operated adjacent to the tribal housing area. Today there are 13 tribal stores operating at key intersections in Madison and Oneida Counties, including four newly built stores and eight that were purchased from non-Indian competitors.

The New York Oneida commercial operations and governmental policy of non-cooperation in regard to taxation have deprived New York and the local governments desperately needed sales and excise tax revenue. [13] Eight non-Indian stores were forced to close in the face of unfair competition and the remaining 16 non-Indian stores compete at a huge disadvantage. A local 2004 smoking survey indicated that 73.1 percent of all smokers purchase cigarettes from tribal stores that circumvent New York's tax system [14]. Across the State, an estimated 25 percent of New York's smokers travel to Indian stores to buy cigarettes depriving New York of hundreds of millions of dollars in both general fund revenue and funding earmarked health care. [15]

This loss of tax revenue and other impacts of aggressive reassertion of tribal sovereignty precluded by the Sherrill decision is well documented in the submissions by the *amici* in *Sherrill* [16] and by the attached affidavits submitted in a real property tax foreclosure case brought against the New York Oneida by Madison County and working its way through both the State Supreme Court and Northern District of New York federal court. [17]

While the Oneida Nation does some good with the wealth from its enterprises, it also uses its wealth to unfairly ensure that it gets its way. [18] It has used gifts to try to leverage

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[11] Oneida Daily Dispatch December 24, 2002 article "Investor documents give financial snapshot of Oneidas' businesses, casino operation".
[12] Department of Taxation and Finance of New York et.al. v. Milhelm Attea and Bros. Inc. etc. et.al. 512 U.S. 61 (1994.)
[13] Syracuse Post Standard July 9, 2005 article "County outlines tax troubles".
[14] Tobacco Fee Madison County – Community Tobacco Survey – June 2004.
[15] Fair Application of Cigarette Tax Alliance (www.factalliance.org).
[16] Amici briefs submitted by the Counties of Madison and Oneida; Towns of Lenox, Stockbridge and Southhampton, NY; The Counties of Cayuga and Seneca; and The State of New York.
[17] Affidavit of Harold Landers, Madison County (NY) Treasurer; Affidavit of Michael P. Oot, Stockbridge Valley School Board President; Randy C. Richards, Superintendent, Stockbridge Valley Central School; and Joseph Slivinski, Madison County Highway Superintendent in Defendant Madison County's Memorandum of Law in Opposition to Plaintiff's Application for a Preliminary Injunction - Oneida Indian Nation of New York v. Madison County, New York NDNY 00-CV-506.
[18] Rome Daily Sentinel January 14, 2005 article "Oneidas give $1 million to help in tsunami relief"

influence with political leaders. [19] It now seeks to fund and thus control local government elections. [20] It has sought to use the influence of purported "no-strings-attached" grants to schools to force the firing of a local school teacher who the Nation leadership disapproved of. [21]

The United States claims a trust responsibility to New York tribes but in the past has made no meaningful acknowledgment for the dispossession of New York's tribes of their ancient homelands. In the 1950's the United States was named as defendant in numerous claims brought before the Indian Claims Commission (ICC) by New York tribes. In those proceedings against the United States, federal officials argued that

a) the United States had no interest in New York State lands;
b) that extinguishing Indian title to land in New York was solely the domain of New York State who had the right to purchase these lands; and
c) that Article IV of the 1794 Treaty of Canandaigua confirmed the right of each of the Six Nations' to sell their lands in New York directly to the State. [22]

The rulings of the ICC tell us that counterclaims against the United States in the pending land claims are valid. A preliminary decision found the United States negligent and liable for failing to discharge its trust responsibilities to New York tribes. In the Oneida claim before the ICC, the decision was never made final because the tribes withdrew in favor of litigation against the local governments. In 1970, the numerous New York Land claims seeking relief recently voided by the Supreme Court decision in *Sherrill* and the Second Circuit decision in *Cayuga*, began their long and tortured journey through the courts bringing us here today.

I'll end the discussion of litigation and controversy with this thought. The solution to New York's Indian problem is not to be found in courtrooms. I have traveled to several destinations around the country to study other land claims and their imperfect but constructive solutions. Negotiated settlements should be our goal. If litigation is pursued, conflict will continue, problems will persist, and NYSAC believes that everyone will lose. In light of *Sherrill* and *Cayuga*, the quest to eject current occupants and ignore long established State and local jurisdiction must be abandoned. The expectations of tribes must be realistically diminished to regaining homeland through land into trust procedures within reasonable limits, consistent with today's realities 200 years after the transactions in question. Even that will be contentious, costly and harmful to relations with tribes that we should seek to celebrate, not castigate.

Where do we go from here? We wish to settle any current and future differences with New York's tribes peacefully through good faith negotiations. I have been asked to

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[19] Syracuse Post Standard April 6, 2005 article "Oneidas are now among top lobbyists"; Utica Observer Dispatch January 23, 2005 article "Oneida Nation's political clout grows".
[20] Utica Observer Dispatch January 27, 2005 article "Oneida Nation urges workers to seek election".
[21] Syracuse Post Standard January 27, 2005 article "School's sports cut in Oneida Nation feud".
[22] Defendant United States "Motion to Consolidate for Summary Judgment or, In the Alternative, For Preliminary Hearing as to the Liability of Defendant", filed Jul 15, 1955, ICC Docket Nos. 300A, 301, 342, 343, 344, 368

present several principles of fairness that will guide the county defendants in future discussions between New York State, the tribes and the federal government:

1. Affected County governments must have a continuous presence and meaningful role in any negotiations to settle Indian land claims in New York. Local legislative approval is a precondition for support of any settlement.

2. Any land area over which tribes seek jurisdiction must lie within easily recognizable boundaries. Indian country must be compact and contiguous and consistent with the principles laid down by the Supreme Court in *Sherrill* that specifically condemned tribal jurisdiction over "checkerboard" lands.

3. Local governments, who are without culpability in these claims, must be compensated for any loss of jurisdiction, lost tax revenue and related past and future expenses. Agreements made in Albany and Washington, DC are implemented in our communities and we have a solemn obligation to prevent passing the costs on to our citizens. Federal and/or state appropriations supplemented by measurable, enforceable, fair tribal contributions are appropriate and will likely be required for local agreement.

4. Tribal enterprises should neither be allowed to compete unfairly against non-Indian business nor interfere with state and local revenue streams. *Department of Taxation v. Milhelm Attea Bros. Inc.* set the precedent that local and state governments are entitled to certain revenues, and the Counties in New York need and expect to receive them.

5. The provisions of any negotiated resolution to New York's Indian problem must be enforceable with waivers of sovereign immunity and designated venues for dispute resolution.

6. Agreements and legislation must create a final resolution to tribal claims and issues affecting local governments. We seek a plan for a predictable future free of controversy. All tribal parties willing to negotiate in good-faith should be heard.

7. The Counties affected by these ancient tribal land claims have always been and continue to be willing to negotiate in good faith where there is legitimate controversy and demonstrated commitment to progress and an equitable solution.

This concludes my remarks. It is a great privilege to have represented NYSAC here today. Chairman Pombo, NYSAC genuinely appreciates your consideration. We pledge support for constructive, inclusive discussion of these incredibly complex and difficult issues. You will find us willing and equal to the task of finally settling New York's ancient Indian land claims.